No. 83-614

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SECURITIES INDUSTRY ASSOCIATION,

Petitioner,

—v.—

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER SECURITIES INDUSTRY ASSOCIATION

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I.

RESPONDENTS ATTEMPT TO REWRITE HISTORY

Obviously aware that the actions of regulators and institutions governed by a statute are a good guide to its meaning, respondents attempt to revise both financial and legislative history. Revisionism, however, cannot eliminate fact.

A. Respondents Recant Administrative Construction

The Comptroller clearly understood that banks were not permitted to be public securities brokers. His Office ruled in 1934 that Section 16 of the Glass-Steagall Act "does not mean that national banks may do a brokerage business;" convinced Congress in 1935 to permit banks to pass on their customers' orders for stock because banks could do so only "as an accommodation thereto;" and repeated through ensuing decades that "[s]ervices in this field must be limited to actual customers of the bank—that is, the customer relationship must exist independently of the particular securities transaction."[1] (*See* SIA Br. at 24, 29 n.52.)[2] No amount of semantic sleight of hand can turn this history into a "longstanding administrative practice and interpretation" (BAC Br. at 7) that *permitted* banks to carry on a securities brokerage business for the public.

Equally apparent is the view of the Securities and Exchange Commission ("SEC"), the agency actually responsible for regulating securities activities. The SEC recently found itself compelled to propose a rule requiring banks that "publicly solicit brokerage business" to register as broker-dealers under the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.* ("1934 Act"). *See* 48 Fed. Reg. 51,930 (1983) (to be codified at

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1 The Board, too, approved of the Comptroller's reading, beginning in 1934. Indeed, the Board expressly quoted from the Comptroller's 1934 ruling in its own ruling that same year. (SIA Br. at 23-24.) Had the Board in any way disagreed with the Comptroller's position, at a minimum, the Board would not have included it then and doubtless would have said so.

2 References to the Brief of Petitioner Securities Industry Association will be cited herein as "SIA Br.;" the Brief of Respondent Bank-America Corporation will be cited as "BAC Br.;" the Brief of the Federal Respondents will be cited as "Fed. R. Br.;" and the Brief of Amici American Bankers Association, et al., will be cited as "ABA Br."

17 C.F.R. pt. 240) (proposed Nov. 15, 1983). The SEC left no doubt that in its opinion banks' recent entry into the brokerage business directly contravenes the Congressional understanding that had led to the exclusion of banks from the definition of "broker" in the 1934 Act:

> Bank brokerage activities and related promotional practices have recently changed significantly from the accommodation functions contemplated by the Congress when it enacted the bank exclusion [in the 1934 Act]. . . . Today, so-called "discount brokerage" is aggressively promoted by many banks. . . . Rather than merely providing accommodation services to existing customers, services are provided [by banks] that are functionally indistinguishable from those offered by registered broker-dealers. . . . The Commission believes that, in enacting the bank exclusion, the Congress did not contemplate that banks would publicly solicit brokerage business. . . .[3]

Despite the obvious relevance of the views of the SEC[4] and the emphasis they received during both the administrative proceedings below and in respondents' briefs here (*e.g.*, BAC Br. at 3, 8; Fed. R. Br. at 27-29), respondents do not include one word of discussion concerning the SEC's proposed rule. Their silence speaks, eloquently, for itself.

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3 48 Fed. Reg. at 51,931. The SEC found highly relevant the Congressional testimony of Thomas G. Corcoran (already cited in SIA Br. at 25-27) in construing the 1934 Act's exclusion of banks. 48 Fed. Reg. at 51,931 n.12. The SEC's view confirms that respondents are misguided in divining that Congress excluded banks from that Act's definition of "broker" because of some other testimony. (Fed. R. Br. at 46 n.43; BAC Br. at 41 n.87.) Respondents' speculation also ignores that Corcoran's testimony related to a change he was urging in a specific provision of the proposed legislation and that Congress adopted his suggestion. (*See* SIA Br. at 27 n.48.)

4 Because securities activities are central to this case, as is the interrelationship between the 1934 Act and the Glass-Steagall Act, the views of the SEC concerning permissible securities activities are entitled to at least as much consideration as those of the Board.

B. Respondents Recast Industry Understanding

Respondents expend considerable effort to explain why, if bank activities "have always involved provision of brokerage services" (BAC Br. at 3), banks had not been in the public brokerage business for nearly 50 years after the Glass-Steagall Act was passed. The actions (or, more precisely, inactions) of the banking industry actually confirm what has been common knowledge for half a century, that banks are barred from the public securities brokerage business. Respondents suggest (*id.*) that banks avoided the public securities business because securities exchanges placed restrictions upon the structure of their members. But, if banks in fact had thought it was permitted, they could have executed orders for the public in both listed and unlisted securities in the over-the-counter market (*see* ABA Br. at 6), which does not require exchange membership.[5]

Respondents' story relies principally, however, upon the alleged precedent of services that banks did offer beginning in the 1970's, as reported by the SEC's 1977 study of bank securities activities.[6] (BAC Br. at 3, 8; Fed. R. Br. at 27-29.) In

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5 Although banks having the proper business structure could, and a few did, retain seats even on the New York Stock Exchange (Fed. R. Br. at 36 n.33), there is no evidence that such banks engaged in the public securities brokerage business after the Glass-Steagall Act was passed.

6 Securities and Exchange Commission, *Initial Report on Bank Securities Activities* (1977) ("*SEC Initial Report*"); Securities and Exchange Commission, *Final Report on Bank Securities Activities* (1977) ("*SEC Final Report*"). Both reports are reprinted in *Reports on Banks' Securities Activities of the SEC*, Senate Comm. on Banking, Housing and Urban Affairs, 95th Cong., 1st Sess. 1, 289 (Comm. Print 1977). These SEC Reports, marked as BAC Exhibits 53 and 54, were virtually the only historical evidence of bank securities activities introduced during the hearing in this case before the Administrative Law Judge, who also relied heavily upon them. *E.g.*, 25A-32A; 74A. Thus, the "facts" found in this respect are simply derivative of the SEC's study.

fact, the SEC study showed that banks still limited their activities either to the accommodation services traditionally offered to their banking customers[7] or to other services largely ministerial in nature, offered by a *de minimis* number of banks,[8] in each of which the banks continued to forward customer orders to brokers for execution.[9] As the SEC pointed out in its recent proposed rulemaking, "[c]urrent bank securities activities . . . differ significantly from those reviewed by

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7 The term applied by the SEC in its 1977 study in this respect was "[c]ustomer transaction service" (*SEC Final Report* at 20 n.40), which it found to be "a distinctly informal service provided as an accommodation to bank customers. As an accommodation, it is not marketed to bank customers, is rarely mentioned in bank literature, and, viewed separately, is uniformly unprofitable to the bank." *SEC Initial Report* at 78.

8 These services included automatic investment services, dividend reinvestment plans and employee stock purchase plans, which were "offered pursuant to specific terms and conditions, are highly automated, limit the amount of securities that can be purchased, involve pooling investors' funds for investment, and generally involve little or no personal contact with participants." *SEC Final Report* at 34 n.63. In the aggregate, the services accounted for less than two-tenths of one percent of all retail securities traded on national stock exchanges. *SEC Initial Report* at 13.

9 Reaching to find any support for their position, respondents also cite (Fed. R. Br. at 28-29; BAC Br. at 13-14) bank trust department activities. But, for example, the SEC found that, at 98% of bank trust departments, "[r]elatively little trading expertise was required of such [trading desk] personnel, since the trader simply relied upon the broker to supply whatever expertise was necessary to obtain 'best execution.' " (*SEC Final Report* at 166 & n.274.) Again, the SEC found that at more than 99% of bank trust departments, "traders had not received any formal training in either securities markets or the securities laws" and at many banks "a telephone without direct lines is typically the only communications facility." (*Id.* at 176-77.) Only 17 of the 4,022 commercial bank trust departments (*i.e.*, 4/10 of 1%) used electronic services to effect a transaction with another institutional investor. (*Id.* at 166 n.274, 178.)

the Commission in its 1977 study of bank securities activities."[10]

The specific activity now at issue, respondents agree, is "the business of executing orders to buy and sell securities" for the public. (Fed. R. Br. at 27.) There is simply no dispute that banks had not engaged in this business for the past 50 years.[11] It bears reiteration that, in this proceeding of admitted "first impression" (*see* SIA Br. at 4 n.4), the Board itself rejected as inapplicable the Bank Holding Company Act criterion that "banks generally have in fact provided the proposed services" (*see* SIA Br. at 17 n.29), and acknowledged that this case involves the "[e]xpansion of banking into securities activities." (155A.)

C. Respondents Reconstruct Legislative History

1. *The Bank Holding Company Act.* Respondents claim that, in 1970, Congress amended the Bank Holding Company Act to eliminate the "direct and significant connection" requirement that had previously applied under that Act (*see* SIA Br. at 13-14) and gave the Board flexibility to adopt the "functionally similar" test applied here. (Fed. R. Br. at 17-21; BAC Br. at 19-21.) The legislative history proves the opposite.

Insofar as relevant here, the Board in 1970 had urged Congress (1) to substitute its "functionally related" test for the statute's "so closely related" standard and (2) to delete the

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10 48 Fed. Reg. at 51,931. The SEC's release also confirmed that its 1977 study had found that the brokerage activities then being conducted by banks "differed from the activities of broker-dealers in several important respects, such as the informal nature of the services rendered, the general absence of advertising for customer transaction services, and the general absence of commissions based on the size of transactions." 48 Fed. Reg. at 51,931 n.9.

11 Nor can respondents avoid the issue by claiming that discount brokerage is a "new form of brokerage activity." (Fed. R. Br. at 48.) "Discount" brokerage is agency brokerage, which has existed for decades, merely offered at a different commission rate.

phrase "the business of" from the statutory provision requiring that proposed activities be "closely related to the business of banking." (*See* SIA Br. at 14.) The compromise reached by the Conference Committee on the Board's proposal was to accept the latter deletion but to refuse the former. The result was that:

> Under the new language of section 4(c)(8) there no longer need be a relationship between the particular activities of the company proposed to be acquired and the business of the particular bank holding company seeking approval of an acquisition under section 4(c)(8). In other words, *under the new section 4(c)(8) there must be a direct and significant connection between the proposed activities and the kinds of activities that banks generally now carry on, i.e., closely related to banking in general.*[12]

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12 H.R. Conf. Rep. 1747, 91st Cong., 2d Sess. 5, *reprinted in* 1970 U.S. Code Cong. & Ad. News 5561, 5572 (emphasis added). Whatever other controversy there may have been about the Conference Committee's actions (*see ICI* II, 450 U.S. at 73-74 n.54), there appears to have been basic agreement in Congress on the point covered by the above-quoted language, as indicated by statements during the House and Senate debates from the respective floor managers of the compromise bill. Representative Patman stated:

> Under the new section 4(c)(8) there must be a direct and significant connection between the proposed activities and the kinds of activities that banks generally now carry on; that is, closely related to banking in general. However, with the deletion of the words "the business of," there no longer need be a relationship between the particular activities of the company purposed [sic] to be acquired [and] the business of the particular bank holding company seeking approval of an acquisition under section 4(c)(8).

116 Cong. Rec. 41,950 (1970). Senator Sparkman stated:

> [The Bill] frees the Board of the restrictive precedents established under the present act and it provides that permissible activities may be related to the business of banking generally, rather than perpetuating the concept that such activities must be related to the specific business carried on by the subsidiary banks of the particular holding company involved.

116 Cong. Rec. 42,424 (1970).

Thus, to the extent the 1970 Amendments to Section 4(c)(8) gave the Board greater flexibility, it was only insofar as a "direct and significant connection" was no longer required between proposed activities and those of the specific applicant holding company. (SIA Br. at 14 n.22.) A "direct and significant connection" *is* required between a proposed activity not generally performed by banks and the activities of banking in general. That is the issue here, and that is precisely the connection the Board did not—and could not—find. (SIA Br. at 15.)

It is no mere "fortuity" (Fed. R. Br. at 20) that the Board used almost exactly the same "functional" language here as it had unsuccessfully urged upon Congress.[13] The Board has attempted to amend the Act in the fashion Congress refused to accept. Having lost that debate before Congress, the Board now seeks reargument before this Court. It should be denied.

2. *The Glass-Steagall Act.* Citing language in the Congressional Reports that "national banks are to be permitted" to purchase and sell securities for their customers "to the same extent as heretofore," respondents claim that Section 16 of the Glass-Steagall Act expressly authorized banks to engage in the public brokerage of both stock and securities. (Fed. R. Br. at 43-44; BAC Br. 40-41, citing S. Rep. No. 77, 73d Cong., 1st Sess. 16 (1933).) Banks, however, had never theretofore statu-

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13 If anything, the "functionally similar" test here applied by the Board is even broader than the "functionally related" test proposed in 1970. At least "functionally related" connoted some kind of a functional or operational connection with banking; whereas, the present similarity test requires no connection whatsoever. Indeed, the Board's "functionally similar" construction becomes patently unreasonable when applied to the full language of Section 4(c)(8), which requires proposed activities "to be so closely related to banking or managing or controlling banks as to be a proper incident thereto." Countless activities arguably are "functionally similar" to "managing or controlling" banks. If that were the standard, the limitation would be meaningless. (*See also* SIA Br. at 18-19.)

torily been "permitted" to purchase and sell *stock* for the public. The McFadden Act of 1927 had authorized banks only to deal in *investment securities* (*i.e.*, high quality debt instruments; *see* SIA Br. at 21 n.36), and courts had repeatedly made clear that conducting a brokerage business in stock or other speculative securities for the public was prohibited for banks.[14] The only permissible activity for banks involving *stock* had been accommodation of their customers, as an incident to banking services.[15]

It was precisely because the Comptroller understood that the exception for "purchasing and selling" investment securities included in the 1933 Glass-Steagall Act was limited to accommodating orders from bank customers that he urged Congress in 1934 to clarify its intent not to restrict banks' incidental authority to accommodate orders in stock as well. He repeatedly explained to Congress that the authority would apply

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14 As late as 1933, the New Jersey Court of Appeals, collecting earlier cases and authorities, held that "a national bank may neither directly for its own account, nor as agent for a customer, legally enter into a contract to purchase speculative securities. . . ." *Cassatt* v. *First National Bank*, 111 N.J.L. 536, 168 A. 585, 588 (Ct. App. 1933), *cert. denied*, 291 U.S. 660 (1934). *See also Pepperday* v. *Citizen's Bank of Latrobe*, 183 Pa. 519, 38 A. 1030, 1031 (1898) ("[i]t is no part of the business of a national bank to engage in the selling of stock for anybody").

15 Perhaps the clearest indication of the general understanding in this respect prior to 1933 was set forth in *Block* v. *Pennsylvania Exchange Bank*, 253 N.Y. 227, 170 N.E. 900 (1930). There Justice Cardozo, then Chief Judge of the New York Court of Appeals—a court that regularly dealt with commercial matters—noted: "[T]he practice of banking as it has developed in our day upholds the purchase of securities for the benefit of *customers whose deposit accounts are sufficient, as the result of loans or otherwise*, to justify the credit." 253 N.Y. at 232, 170 N.E. at 901-02 (emphasis added). The other authorities cited by respondents (Fed. R. Br. at 44; BAC Br. at 40) are not to the contrary; none shows that banks brokered stock for the public, while they do confirm that banks generally acted only to accommodate unsolicited securities orders from their customers by forwarding the orders to brokers for execution.

only to accommodating bank customers, and plainly Congress understood that when it amended Section 16 in 1935. (*See* SIA Br. at 22-25.) As respondents concede (BAC Br. at 37 & n.78), that amendment was regarded as "technical" and not intended to make any "fundamental changes in the existing banking laws." *See* H.R. Rep. No. 742, 74th Cong., 1st Sess. 1-2 (1935). Yet they would have this Court conclude that in 1935, through a technical, nonsubstantive amendment to a statute that broadly barred banks from securities activities, Congress for the only time in two centuries expressly authorized banks to execute *stock* transactions for the public.

Preposterous on its face, this conclusion would also write the "without recourse" restriction out of the statute. Respondents' only response to this restriction is to claim that SIA must somehow be wrong in its analysis (SIA Br. at 31-34) that "without recourse" requires banks to forward customers' orders to brokers for execution. (Fed. R. Br. at 49-50; BAC Br. at 38 n.81.) They offer no explanation of what "without recourse" does mean in a brokerage context, citing instead only the Board's interpretation of the phrase as meaning without endorsement or guarantee. (150-51A n.50.) But, that interpretation can have no application to stock brokerage and has already been rejected by this Court. (*See* SIA Br. at 31-33.) Respondents simply have no answer.[16]

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16 Respondents' *amici*, citing the Restatement (Second) of Agency §§ 321, 322 (1958), suggest that banks cannot avoid the risk of liability to third-party purchasers and sellers, because banks are agents for undisclosed principals. (ABA Br. at 10-11.) This contention reflects an apparent lack of knowledge of the securities industry in general and the record in this case in particular. As the record shows (J.A. 249-57; Record on Appeal at R.2590-98 (Jannotta testimony at 3-11)), many securities firms act as "introducing" brokers and forward their customers' securities orders to a correspondent firm for execution. Some firms do this through a single "omnibus" account maintained in the name of the introducing broker; others "give up" the names of their customers to the correspondent firm, under what is commonly referred to as a "fully disclosed" arrangement. The forwarding broker thereby avoids the obligation of having to carry the customers' accounts; confirmations and account statements are sent directly to the cus-

Equally absent from respondents' briefs is any explanation of why Congress would have permitted bank affiliates to do principally under Section 20 of the Act what Congress barred entirely to banks themselves under Section 16. (*See* SIA Br. at 41-42.) Nor do respondents present any support for the Second Circuit's unprecedented decision vesting the Board with discretion, withheld by Congress in the Glass-Steagall Act, to decide which activities barred entirely to banks may nevertheless be performed principally by their affiliates. (*Id.*) The reason for this absence of support is also clear. There is none.

Respondents argue that the term "public sale" in Section 20 refers only to operations involving the marketing of new issues or the introduction of blocks of securities to the public.[17] (Fed. R. Br. at 31-32; BAC Br. at 25-27.) But, if that were so, the term would be redundant to the accompanying terms "underwriting" and "floating", contrary to the settled rule of statutory construction that all terms should be accorded a meaning.[18] Equally unavailing is respondents' observation (Fed. R. Br. at 31; BAC Br. at 26-27) that Section 20 does not

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tomers. (In recognition of this, the SEC exempts from its normal net capital requirement introducing brokers who forward accounts solely on a "fully disclosed" basis. 15 C.F.R. § 240.15c3-1(a)(2)(i).) A bank similarly can pass along its customers' orders to a broker for execution, pursuant to a "fully disclosed" arrangement under which the broker looks directly to the customer for performance. There is thus no "undisclosed principal" and, as required by the Glass-Steagall Act, "recourse" against the bank is avoided.

17 Significantly, respondents abandon the principal rationale articulated by the Second Circuit for holding that the term "public sale" in Section 20 is inapplicable to brokerage—that the terms in the section apply only to principal activity, and therefore are inapplicable to agency brokerage. (161A; *see* SIA Br. at 38-39.)

18 *E.g.*, *Colautti* v. *Franklin*, 439 U.S. 379, 392 (1979). The broad reach of the activities described in Section 20 ("issue, flotation, underwriting, public sale, or distribution") indicates that Congress intended not to be redundant, but rather to cover the entire spectrum of securities transactions, both principal and agency, just as the breadth of the instruments described in Section 20 ("stocks, bonds,

use the term "brokerage" or the "more precise" (162A) terms found in Section 16. Narrower terminology should be expected in Section 16, because Congress there drew a very narrow exception to the otherwise broad prohibition against banks' dealing in securities. In Section 20, however, Congress legislated a broad prohibition, and correspondingly broad terms should be expected.[19] Those terms prohibit the activity here at issue.

II.

ONLY CONGRESS MAY PROPERLY ACCOMPLISH THE POLICY CHANGE MADE BY THE BOARD

Ironically, testifying on April 4, 1984 during a Congressional hearing on legislation concerning restructuring of the financial service industries, Board Chairman Volcker, who voted in favor of the Schwab acquisition, stressed that "[w]e have a [financial] system that is changing, helter skelter, in response to

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debentures, notes, or other securities") indicates Congress' intent to cover the entire range of securities, both equity and debt. *See ICI* I, 401 U.S. 617, 635 (1971).

19 Congress did not use the generic term "brokerage" in Section 16 either, but rather used the more specific phrase "purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers"—underscoring Congressional intent to limit banks solely to forwarding orders from their banking customers to brokers for execution. Nor, contrary to respondents' arguments (Fed. R. Br. at 40 n.38; BAC Br. at 33 n.71), do any "unreasonable results" flow from Congress' omission from Section 20 of the Section 16 exception. The exception was necessary in Section 16 because otherwise banks would have been entirely prohibited even from forwarding orders to brokers as an accommodation incidental to other banking services. It would be anomalous if Section 20 also included such a provision. Section 20 permitted bank affiliates to engage in public securities brokerage, so long as it was not their principal activity. No reason existed to include the accommodation language of Section 16 in addition because, as the federal respondents put it, "affiliates of banks have no preexisting customers of banking services." (Fed. R. Br. at 40 n.38.)

a variety of economic and other forces, but with little sense of the public policy issues at stake." And, as he further put it in urging Congress to assert its authority in the financial services field, "[d]eregulation by fiat, by exploitation of loopholes, and by diverse actions taken by individual states is hardly an appropriate response, and threatens to undermine and render ineffective federal oversight of banking."[20]

The delicately balanced regulatory structure built by Congress to govern the financial service industries is beginning to crack apart—impelled to no little degree by the acquisition at issue, as even BAC in effect admits. (BAC Br. at 6; *see also* SIA Br. at 4-5.) If the established boundaries between the industries are to be eradicated, that policy decision should be legislated by Congress, because only it can weigh all the considerations involved. (*See* SIA Br. 44-46.) It should not be dictated, as here, by administrators through *ad hoc* rulings that erode long-standing legislative limits.

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20 Statement by Paul A. Volcker, Chairman, Board of Governors of the Federal Reserve System before the Subcommittee on Telecommunications, Consumer Protection and Finance of the House Committee on Energy and Commerce United States House of Representatives at 3, 4 (April 4, 1984). On that same day Representative Wirth, Chairman of that Subcommittee, introduced legislation to impose a moratorium on the expansion of activities by all financial services institutions, pending a detailed study of the capital markets by a Congressionally appointed commission. H.R. 5342, 98th Cong., 2d Sess. (1984).

CONCLUSION

For each and all the reasons set forth above and in SIA's initial brief, the decision of the Court of Appeals should be reversed, and the case remanded with directions to vacate the Board's Order of January 7, 1983 as null and void and to direct respondent BAC to divest itself of Schwab.

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